No. 82-973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

PREDRAG STEVIC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE COMMITTEE ON MIGRATION AND REFUGEE AFFAIRS OF THE AMERICAN COUNCIL OF VOLUNTARY AGENCIES FOR FOREIGN SERVICE AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The American Council of Voluntary Agencies for Foreign Service (ACVA) is an association of 45 humanitarian and development assistance groups. ACVA was established in 1943 to provide a means for consultation, coordination, and planning to assure the most effec-

tive use of contributions of the American community for the assistance of refugees. The members of ACVA's Committee on Migration and Refugee Affairs who participated in the approval of this brief are:

American Council for Nationalities Service
American Fund for Czechoslovak Refugees
Church World Service
HIAS (Hebrew Immigrant Aid Society)
International Rescue Committee
Lutheran Immigration and Refugee Service
Polish American Immigration and Relief Committee
The Right Reverend John M. Allin for the
Presiding Bishop's Fund for World Relief/
The Episcopal Church
Tolstoy Foundation

ACVA has a special interest in the meaning of "well-founded fear" of persecution, since it strongly and actively supported accession to the Refugee Protocol in 1968. The decision here will affect ACVA and its constituencies.

The Washington Lawyers' Committee for Civil Rights Under Law is the Washington, D.C. affiliate of the Lawyers' Committee for Civil Rights Under Law, which was organized in 1963, at the request of President Kennedy, to involve private attorneys in the national effort to assure equal rights for all members of society. The national and Washington Lawyers' Committees long have provided volunteer legal representation to individuals with claims of unlawful discrimination and other invasions of civil rights. In 1978 the Washington Lawyers' Committee established an Alien Rights Project and began regularly to represent noncitizens who fear persecution if returned to their homelands. The decision in this case will affect the activities of the Washington Lawyers' Committee on behalf of such noncitizens.

SUMMARY OF ARGUMENT

The question presented by this case is not, as the Government's brief suggests, simply one of verbal formulation. The Government frames the question as whether a "clear probability" or "realistic likelihood" of persecution describes the same situation as the phrase "well-founded fear" of persecution. In fact, the question is about evidence, not verbal formulas. As the Second Circuit held, the Government seeks to require of applicants for refugee status a type and level of evidentiary showing that is inconsistent with the Immigration and Nationality Act ("INA") and the U.N. Refugee Convention.

The Government's error is threefold. First, the Government insists that an alien establish that he will be singled out, or targeted, for persecution in his country of origin. But such a showing is only one of many types of evidence that could tend to establish a likelihood of persecution; to disregard all other types is inconsistent with any reasonable construction of "well-founded fear" of persecution. Second, the Government ignores the alien's subjective fear of persecution, stripping the "fear" out of the "well-founded fear" standard. And third, the Government demands a quantity of evidence in excess of that required by the statute—a quantity that would be consistent only with a statute requiring certainty of persecution.

The Government's theory of the case rests on the assertion that Congress intended to make the INS view of "well-founded fear" the law of the land. That theory is unpersuasive. First, the construction of the statute advocated by the Government would involve the United States in a breach of its treaty obligations under the Refugee Convention and Protocol; such a construction is to be avoided if at all possible. Second, in 1980 Congress expressly incorporated the treaty standard into the

statute. Finally, the Government's theory depends on the preexistence of a coherent practice of requiring the evidentiary showing the Government propounds—a practice that has never existed.

ARGUMENT

IN REQUIRING A CLAIMANT TO PROVE WITH CERTAINTY THAT HE WILL BE TARGETED FOR PERSECUTION AND IN IGNORING THE CLAIMANT'S SUBJECTIVE FEAR, THE GOVERNMENT MISCONSTRUES THE STATUTE AND THE REFUGEE CONVENTION.

Section 243(h) of the Immigration and Nationality Act [1] and article 33 of the 1951 U.N. Convention Relating to the Status of Refugees [2] provide that an alien shall not be forcibly returned to a country where circumstances exist that cause the alien to have a "well-founded fear" of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. For the reasons set forth below, the Second Circuit was correct in holding that, "under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution," [3] and that "[t]he BIA's denial of Stevic's second motion was based on a legal test which . . . is no longer the law." [4]

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[1] 8 U.S.C. § 1253(h) (Supp. IV 1980).

[2] 189 U.N.T.S. 137.

[3] *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982).

[4] *Id.* at 409. In order to prevail on a motion to reopen deportation proceedings, the claimant must present a *prima facie* case of eligibility for relief. *INS v. Wang*, 450 U.S. 139, 141 (1981) (considering reopening question under INA § 244). Since the Board of Immigration Appeals ("BIA") applied an erroneous legal standard in deciding whether Mr. Stevic had presented a *prima facie* case, its decision was properly reversed. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

A. The Government's Construction of the Statute Should Be Rejected Because It Would Place the United States in Violation of Its Treaty Obligations.

In 1968, the United States became a party to the 1967 United Nations Protocol Relating to the Status of Refugees.[5] Under article 1 of the Protocol, the United States undertook to adhere to the 1951 U.N. Convention Relating to the Status of Refugees, which provides certain rights and protections to "refugees."[6] The Convention and Protocol define as a "refugee" a person who,

> "owing to *well-founded fear* of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[7]

The Convention and Protocol do not give refugees an absolute right to permanent asylum in any country of refuge. However, key among the protections they give a refugee is the right of *nonrefoulement* (nonexpulsion), set forth in article 33:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[8]

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[5] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 ("Protocol").

[6] 189 U.N.T.S. 137 ("Convention").

[7] *Id.*, art. 1(A)(2) (emphasis added); *see also* Protocol, art. I(2).

[8] Convention, art. 33(1). Article 33(2) denies the benefits of Article 33(1) to a refugee "whom there are reasonable grounds for

Article 33 prohibits the forcible return of a refugee to his country of origin—which is the place where "his life or freedom would be threatened." [9] The central inquiry involved in determining a *nonrefoulement* claim is whether circumstances exist in the country of proposed return which cause the claimant to have a "well-founded fear" that he will face persecution there.

A leading commentator on refugee law has observed that "well-founded fear of being persecuted . . . is probably the most difficult part of the definition [of refugee] to interpret." [10] The Government would obviate the difficulty by supplanting the broad concept of "well-founded fear" with a one-dimensional "singling out" test of its own. Because that approach would place the United States in violation of its international obligations, it must be rejected.

1. *To require the evidentiary showing proposed by the Government would conflict with the obligations imposed by the Convention and Protocol.*

To be a refugee under the Convention and Protocol, one must have a "fear" of persecution that is "well-founded." "Well-founded" means that the fear must be justified in light of the external facts; [11] but the treaty

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regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

[9] 2 A. Grahl-Madsen, *The Status of Refugees in International Law* § 178, at 93 (1972). *See also* Weis, *The Concept of Refugee in International Law*, 87 Journal du Droit International 928, 940 (Oct.-Nov.-Dec. 1960). Dr. Weis, former Legal Adviser to the United Nations High Commissioner for Refugees, and Professor Grahl-Madsen are two of the world's leading authorities on international refugee law.

[10] Weis, *supra* note 9, at 970.

[11] *See, e.g., Hearings on Refugee Act Reauthorization Before the House Committee on the Judiciary, Subcommittee on Immigration,*

nowhere limits the types of facts that are to be considered in this connection. In particular, the treaty does not allow a signatory nation to refuse to consider any evidence other than proof that the government in the country of origin will actually single out or target the alien for persecutory treatment.

The U.N. Ad Hoc Committee on Statelessness and Related Problems, which drafted the Convention, interpreted "well-founded fear" to mean "that a person has either actually been a victim of persecution *or can show good reasons why he fears persecution.*" [12] It placed no limitation on the types of "good reasons" that could suffice. As expert commentators have recognized, the universe of possibly relevant external facts is as broad as the range of possible circumstances that may exist.[13] Proof that the claimant will be targeted for persecution by the authorities is not necessary to establish well-founded fear. To the contrary, depending on the circumstances, persecutory action that is aimed at a group, or is generalized, or is even random may support a claim.[14]

Refugees, and International Law, 98th Cong., 1st Sess. (statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Department of Justice, at 4) (June 7, 1983).

[12] United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 39, E/1618, E/AC.32/5 (1950) (emphasis added).

[13] "[I]t is apparent that the likelihood of becoming a victim of persecution may vary from person to person. For example, a well-known personality may be more exposed to persecution than a person who has always remained obscure. Also, some persons are more strong-willed or more outspoken than others, and therefore more susceptible to attract the attention of the authorities than other people." 1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 175 (1960).

[14] "Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either

The United Nations High Commissioner for Refugees ("UNHCR") has endorsed this position. Because UNHCR is the agency charged with implementing and supervising the Convention on an international level,[15] its views are entitled to significant weight. The Government apparently recognizes this and attempts to reconcile its positions with those of UNHCR.[16] But that attempted reconcilation rests on a selective and misleading review of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*.[17] The Government's evidentiary requirements are in fact inconsistent with the *Handbook*.

The Government quotes part of a passage from the *Handbook* to establish that "[t]he UNHCR thus recognized . . . that an applicant for refugee status . . . must continue to show 'good reason why *he individually* fears persecution.' "[18] However, the unedited passage cannot be said to support the Government's reading. The *Handbook* states that, *unless* a "group determination" of refugee status is appropriate—"whereby each member of the group is regarded *prima facie* . . . as a refugee"—

> "an applicant for refugee status must normally show good reason why he individually fears persecution.

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put to death or sent to some remote 'labour camp,' or that people are arrested and detailed for an indefinite period on the slightest suspicion of political non-conformity. In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return. It cannot—and should not—be required that an applicant shall prove that the police have already knocked on his door." 1 A. Grahl-Madsen, *supra* note 13, § 78, at 180.

[15] *See* Convention, preamble; Protocol, art. II.

[16] Br. Pet. 34-35.

[17] *Id.*

[18] Br. Pet. 35, *quoting Handbook* ¶ 45 (emphasis added by the Government).

> It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word 'fear' refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution." [19]

And the *Handbook* elsewhere expressly recognizes the relevance of the experiences of the alien's "friends and other members of the same racial or social group." [20] Thus, the *Handbook*, like the authors of the treaty and the expert commentators, rejects the notion that only proof that the individual will be specifically targeted for persecution can suffice.

There can be no doubt that the Government seeks to render irrelevant all types of evidence except proof of "singling out." It asserts that its position would accommodate "various forms" of objective evidence,[21] but immediately adds that such evidence must "provide some indication that the particular alien would be singled out for persecution upon his return." [22] The BIA rejected Mr. Stevic's claim because he did not prove that "he *will be singled out* for persecution." [23] The BIA decision, while not unambiguous, indicates that the BIA required evidence, "specifically relating to the respondent," [24] that persecution will certainly meet him upon his return. And in other recent litigation the Government has advocated the same inflexible rule. In *Almirol v. INS*,[25] the court overturned a denial of refugee status precisely because the Government was demanding—wrongly in the court's view

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[19] *Handbook* ¶¶ 44-45.

[20] *Id.* ¶ 43.

[21] Br. Pet. 23.

[22] Br. Pet. 24.

[23] *See* Pet. Cert., App. D, at 31a (emphasis added).

[24] *Id.*

[25] 550 F. Supp. 253 (N.D. Cal. 1982).

—that the applicant "show that he was the 'target' of the Philippine government's persecution." [26] Such a requirement cannot be squared with the Convention and Protocol.

The Government's position conflicts with the treaty also in that it would give sole significance to the external facts, thus reading the subjective element of "fear" out entirely. The UNHCR *Handbook* affirms emphatically "the importance that the definition attaches to the subjective element." [27] It goes on to explain:

> "Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified." [28]

By including a reference to the applicant's state of mind, the treaty not only adds a second element that he must show, but also recognizes the sometimes complex interplay between his state of mind and the external situation. The existence of a sincere and strongly held—even "exag-

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[26] 550 F. Supp. at 256. "The Commissioner [of INS], however, states in the record that 'there is no firm evidence to establish the applicant is actually being sought by this government for punitive purposes.'" *Id.*

The Government's stringent "singling out" approach is further illustrated by its position toward Ethiopians who fear return to the Communist regime of Mengistu Haile-Mariam. The State Department has observed that "it is 'very difficult' for applicants to meet the standards for asylum unless they are *well-known political enemies of the Ethiopian government* or are related to one." *Apparent Policy Inconsistency: U.S. Pushing Ethiopians to Go Home*, Wash. Post, Jan. 26, 1982, at A1 (emphasis added). The Government's approach bars the claims of Ethiopians who are not politically prominent, but who are "Westernized, highly educated, many of them children of officials in the Haile Selassie Government overthrown by Col. Mengistu," and who have a well-founded fear of persecution in a country where suspected antirevolutionaries have been arrested, tortured, summarily executed, and harrassed. Lewis, *Hypocrisy Wins Again*, N.Y. Times, Jan. 4, 1982, at A23.

[27] *Handbook* ¶ 41.

[28] *Id.*

gerated"—subjective fear may, in conjunction with the external facts, have a bearing on whether that fear is well-founded.[29] By ignoring the subjective element, the Government ignores this interrelationship as well as the text of the treaty and the statute.

Finally, the quantity of evidence demanded by the Government is inconsistent with the accepted international understanding of what the treaty means. The very words, "well-founded fear," are inconsistent with certainty. And it is generally understood that the evidentiary realities of refugee claims make certainty unattainable:

> "The normal rules of evidence are, however, difficult to apply in proceedings for the determination of refugee status. The applicant may call witnesses in support of his statement and he may sometimes be able to present documentary evidence. But it follows from the very situation in which he finds himself as an exile, that he will rarely be in a position to submit conclusive evidence. It will essentially be a question whether his submissions are credible and, in the circumstances, plausible." [30]

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[29] "Thus the circumstances and background of the person, his psychological attitude and sensitivity towards his environment play a role as well as the objective facts—what may be regarded as 'good reasons' in one case may not be 'good reasons' in another."

Weis, *supra* note 9, at 970. *See also* 1 A. Grahl-Madsen, *supra* note 13, §§ 76-79, at 173-81 (to determine if fear is "well-founded," the decisionmaker must consider both the claimant's state of mind and the objective facts).

[30] Weis, *supra* note 9, at 986. *See also* 2 A. Grahl-Madsen, *supra* note 9, § 178, at 93 ("The rule of *nonrefoulement* [is] an obligation to refrain from forcibly returning a refugee to a country where he is *likely* to suffer political persecution.") (emphasis added).

In demanding a "clear probability of persecution," [31] the Government would erect a hurdle higher than the treaty contemplates.[32]

In interpreting the treaty, the Court "must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " [33] Moreover, "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." [34] In this case the language of the treaty, the international understanding about its meaning, and generosity toward the rights granted by it all favor a reading that is in conflict with the Government's cramped position.[35]

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[31] *E.g.*, Pet. Br. 4, 8, 10.

[32] *See* Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 Int. Law. 204, 234 (1969) (the burden of proof required by the BIA under section 243(h) "is an almost impossible one to carry"). The late Professor Evans, an astute and thorough chronicler of United States asylum and refugee law, found that the Government's "rigorous interpretation" of section 243(h) did not comport with congressional intent even before the 1980 Refugee Act. *Id.* at 253.

[33] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982), *quoting Maximov v. United States*, 373 U.S. 49, 54 (1963).

[34] *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *see Kolovrat v. Oregon*, 366 U.S. 187, 192-93 (1961) ("This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.") (footnote omitted); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("As [treaties] are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, *as understood in the public law of nations*, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.") (emphasis added).

[35] The Court has said that "in resolving doubts the construction of a treaty by the political departments of the government, while

2. *In ratifying the Convention and Protocol, the United States expressed no reservation qualifying its obligation to comply with the treaty standard.*

The Government argues that the United States ratified the Refugee Protocol on the understanding that it would not alter or enlarge basic U.S. legal obligations toward refugees. Therefore, the Government argues, the Protocol (and Convention) cannot be said to have any effect on the standard used by the INS in deciding section 243(h) claims.

The legislative history of U.S. accession to the Protocol does not support this argument. Carefully read, the history shows that the executive branch assured the Senate that (a) the Protocol would not require the United States to admit greater numbers of refugees as *immigrants*,[36] and (b) the Protocol's provisions setting forth the civil, political, economic, and social rights of refugees in countries of refuge would not require the United States to take any steps to implement those rights. These assurances did not foreclose changes in the manner in which

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not conclusive upon courts called upon to construe it, is nevertheless of weight." *Factor v. Laubenheimer*, 290 U.S. at 295. But this rule of interpretation has no force where, as here, there is nothing in the "available diplomatic records and correspondence," *id.*, that provides a basis for according "weight" to the Government's views. Moreover, *Factor* and *Kolovrat v. Oregon*, *supra*, refer a court to the diplomatic history of a treaty, *see, e.g.*, 366 U.S. at 194-95; 290 U.S. at 294-95; they do not wrap the Government's *post hoc* arguments in a mantle of validity. In any event, even if the views of the agencies charged with the implementation of treaties are entitled to weight, there has been no consistent view of refugee status held by INS and the State Department. *See* Part C *infra*.

[36] *See* S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 6, 10 (1968) (testimony of Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State). *See also* S. Exec. K, 90th Cong., 2d Sess. III (1968) (President's letter of transmittal). Neither section 243(h) nor article 33 provides for the admission of refugees as immigrants—that is, aliens admitted for permanent residence.

section 243(h) was implemented to comply with article 33. Indeed, such changes may have been anticipated.

The Protocol and Convention constitute in large part a bill of civil, political, economic, and social rights for aliens who are granted refugee status in countries of refuge. The United States generally affords *all* aliens the rights required for refugees by the Protocol and Convention. Thus, the observation by a State Department spokesman in 1968 that "refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"[37] cannot be taken as a guarantee that ratification of the Protocol would have no effect on U.S. immigration law. Indeed, the observation did not even relate to immigration law, but to laws and policies concerning issues such as employment, religion, free speech, and cultural identity.[38] The point was that the civil and related rights enjoyed by all aliens in the United States satisfied the specific obligations due refugees under the Protocol.

The Senate was informed by a State Department spokesman also that the INA's deportation provisions could be administered in conformity with the Protocol, without the need for legislative amendments.[39] This statement left open the possibility that the Protocol might require changes in current immigration practice, but assumed that such changes could be achieved under the existing statute. The Secretary of State's words highlight this understanding of the Protocol's effect:

> "[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is *com-*

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[37] S. Exec. Rep. No. 14, *supra* note 36, at 4; *see* Br. Pet. 27.

[38] In a similar context, the President and Secretary of State remarked that accession "would not impinge adversely" on existing laws. S. Exec. K, *supra* note 36, at III, VII.

[39] S. Exec. Rep. No. 14, *supra* note 36, at 6.

parable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. Section 1254, and *it can be implemented within* the administrative discretion provided by existing regulations." [40]

These statements do not support the proposition that the Senate approved the Protocol on the "express understanding" [41] that it would not affect the INS approach to section 243(h) claims. Instead, the Senate was informed that article 33 would not require amendment of the INA because the relevant treaty provisions could be implemented administratively.

When the United States wanted to limit the effect of the Protocol on U.S. law, it knew how to do so unambiguously. The United States adopted two reservations to the Protocol, one relating to the taxation of nonresident aliens, and the other to residency requirements for social security benefits.[42] The absence of any qualification on the United States' acceptance of article 33 stands in sharp contrast to these express limitations.

3. *The statute should be construed to avoid a violation of U.S. treaty obligations.*

As a treaty acceded to by the U.S. executive and ratified with the advice and consent of the Senate, the Protocol became, in 1968, the supreme law of the land.[43] It also, of course, gave rise to international obligations on the part of the United States to the other signatory na-

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[40] S. Exec. K, *supra* note 36, at VIII (emphasis added).

[41] Br. Pet. 25.

[42] The United States ratified the Protocol subject to the reservations that (a) the United States would tax refugees who are not U.S. residents in accordance with its general rules applicable to nonresident aliens, notwithstanding article 29 of the Convention, which provides for "national" treatment, and (b) the Convention provision on national treatment of refugees with respect to social security would give way to a less favorable standard where the Social Security Act requires. S. Exec. Rep. No. 14, *supra* note 36, at 2.

[43] U.S. Const., art VI, cl. 2.

tions. If the Court were to construe the INA to require a greater evidentiary showing for refugee status than the treaty contemplates, a conflict would be generated between two coequal federal laws. And if the Court determined that the statute prevailed as a matter of domestic U.S. law, the implementation of the statute in a manner inconsistent with the treaty would involve the United States in a breach of its international obligations.[44]

The courts have developed canons of construction to avoid such an undesirable result. When a treaty and a statute "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either . . . ."[45] To that end, "a statute should, if possible, be construed in a manner consistent with treaty obligations . . . ."[46] That is obviously possible here, where the relevant language of the treaty and statute are identical. The Court should construe section 243(h) to comport with article 33 of the Convention, by rejecting the Government's narrow approach to the implementation of the statute.

B. The 1980 Amendment to Section 243(h) Incorporated into U.S. Statutory Law the Treaty Prohibition Against the Forcible Return of Refugees.

U.S. immigration law has contained a "withholding of deportation" provision of some sort for over thirty years. Congress first enacted section 243(h) in 1952 as part of the original INA. That law authorized the Attorney General, in his discretion, to withhold the deportation of

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[44] *See generally Restatement (Second) of Foreign Relations Law of the United States* §§ 141-45 (1965); H. Steiner & D. Vagts, *Transnational Legal Problems* 555-61 (2d ed. 1976).

[45] *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

[46] *Diggs v. Schultz*, 470 F.2d 461, 466 (D.C. Cir.), *cert. denied*, 411 U.S. 931 (1972) (dictum); *see Restatement (Second) of Foreign Relations Law of the United States* § 145 comment b & reporter's note 1 (1965); H. Steiner & D. Vagts, *supra* note 44.

an alien if in his opinion the alien would be *physically* persecuted in the country of deportation.[47] Congress amended section 243(h) in 1965 by replacing "physical persecution" with "persecution on account of race, religion, or political opinion."[48] The discretionary nature of the Attorney General's authority remained unchanged.

In the Refugee Act of 1980,[49] Congress adopted the U.N. definition of "refugee,"[50] established for the first

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[47] Immigration and Nationality Act, Pub. L. No. 414, ch. 477, § 243(h), 66 Stat. 163, 214 (1952) (amended 1965, 1980). Prior to enactment of the INA in 1952, the Internal Security Act of 1950 provided:

> "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (1950) (repealed 1952). When the immigration laws were revised by the INA in 1952, section 23 was repealed and reemerged in revised form as section 243(h) of the INA.

[48] INA Amendments of 1965, § 11, 79 Stat. 911, 918, 8 U.S.C. § 1253(h) (1976) (amended by Refugee Act of 1980, § 203(e), 8 U.S.C. § 1253(h) (Supp. IV 1980)).

[49] Pub. L. 96-212, 94 Stat. 102.

[50] In language substantially identical to that of the U.N. Convention, the 1980 Act defines a "refugee" as

> "Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such a person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (Supp. IV 1980).

Prior to 1980, the INA contained a somewhat comparable provision, INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (repealed 1980), added by the INA Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965). That provision as enacted in 1965 created the "seventh preference" immigrant visa quota, authorizing the use of

time a rational system for admitting as immigrants refugees located abroad,[51] and implemented programs for the resettlement of such refugees in this country.[52] In addition, Congress expressly adopted the Convention and Protocol prohibition of *refoulement* by amending INA section 243(h) to provide:

> "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion." [53]

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up to 6% of the Eastern Hemisphere immigrant visa quota for the "conditional entry" of aliens fleeing communist or middle eastern countries on account of persecution or fear of persecution, or fleeing natural disaster. Subsequent legislation made seventh preference visas available regardless of an alien's hemisphere of origin. INA Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976); Act of October 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978).

[51] The Refugee Act created a special immigration category allocating visas for the admission of "refugees." 8 U.S.C. § 1157(c) (Supp. IV 1980). The Act fixed the refugee visa allocation at 50,000 each year for 1980, 1981, and 1982, subject to Presidential authority to lift the ceiling, after consulting with Congress, to cope with emergencies. After 1982, the annual refugee visa allocation is to be established by the President in consultation with Congress. Most of the INA's provisions disqualifying aliens as immigrants, such as those relating to labor certification, public charges, quota priority, documents, and literacy, are inapplicable to refugees. Moreover, the Attorney General may waive any other exclusionary ground that might otherwise bar a refugee, except the exclusion provisions relating to national security, former Nazis, and trafficking in narcotics.

[52] *See* Pub. L. No. 96-212, 94 Stat. 102, titles II-IV.

[53] 8 U.S.C. § 1253(h)(1) (Supp. IV 1980). This amendment to section 243(h) made several significant changes in that provision. First, withholding was made mandatory if the elements of a claim were met. Second, Congress rewrote the section to reflect the *nonrefoulement* obligation as set forth in article 33 of the Refugee Convention. Third, withholding was extended to aliens deemed

Congress also added, in 1980, the first statutory basis in U.S. law for granting political asylum.[54] Political asylum provides another route for aliens who are within the United States to seek permission to stay on account of their well-founded fear of persecution. While a section 243(h) claim is made in a deportation or exclusion proceeding and decided by an immigration judge, political asylum may be sought from an INS district director outside the context of any such proceeding. In contrast to section 243(h) claims, a request for political asylum may be denied in the Government's discretion, even if a well-founded fear of persecution exists. A rejected asylum applicant may pursue his section 243(h) claim in a subsequent deportation or exclusion proceeding.

The legislative reports make clear that Congress modeled the Refugee Act's new definition of refugee on the U.N. definition. The legislative history also leaves no question about Congress' intent to adopt the Convention's rule of *nonrefoulement*. The Conference Committee statement provides, in full:

> "ASYLUM AND WITHHOLDING OF DEPORTATION
>
> "The Senate bill provided for withholding deportation of aliens to countries where they would face

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not to have entered the United States, such as those apprehended at the border, whose right to remain is determined in exclusion proceedings, as well as to aliens deemed to have made an "entry," who are subject to deportation proceedings.

[54] Asylum regulations before the Refugee Act were promulgated under the Attorney General's general authority to administer the immigration laws under INA § 103(a). 8 U.S.C. § 1103(a) (1976). Section 208 of the INA, added by the Refugee Act, specifically directs the Attorney General to establish procedures for granting asylum to aliens, irrespective of status, who are physically present in the United States, at land borders, or at ports of entry. 8 U.S.C. § 1158 (Supp. IV 1980). To be eligible for asylum, which is granted in the Attorney General's or his delegate's discretion, an alien must be a "refugee" as defined by the Refugee Act.

persecution, unless their deportation would be permitted under the U.N. Convention and Protocol Relating to the Status of Refugees.

"The House amendment provided a similar withholding procedure unless any of four specific conditions (those set forth in the aforementioned international agreements) were met.

"The Conference substitute adopts the House provision *with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.* The Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation." [55]

There is no hint in the Conference Committee Report of a legislative finding that the amendment was considered purely cosmetic, and no endorsement of previous practice under section 243(h). Moreover, in presenting the Conference Committee Report to the Senate, Senator Kennedy, the chief Senate sponsor of the Refugee Act of 1980, stated that, "relative to the suspension of deportation, under Section 243(h) of the Immigration and Nationality Act, it is the intention of the Conferees that the *new* provisions of this Act shall be implemented consistent with the relevant provisions of the United Nations Convention and Protocol." [56] The legislators thus treated as new initiatives the addition of an entirely new statutory asylum provision *and* the amendment of the existing withholding of deportation provision to incorporate the mandatory *non-refoulement* obligation.[57]

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[55] S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (emphasis added).

[56] 126 Cong. Rec. S 1754 (1980) (emphasis added).

[57] The Government makes much of the observation in the 1979 report by the House Committee on the Judiciary on H.R. 2816 (the House bill that eventually became the Refugee Act of 1980) that, "[a]lthough [section 243(h)] has been held by court and adminis-

The provisions of and deliberations on the proposed Immigration Reform and Control Act of 1983[58] also strongly suggest that the Government's arguments are ill-founded. The bill, which has twice passed the Senate, provides that immigration judges shall use country profiles prepared by the Secretary of State "as general guidelines in making the asylum [or withholding of deportation] determination."[59] The Senate Report said with respect to this provision:

> "The new section also provides that the Secretary of State shall, on a continuing basis and without reference to individual applications, make available to the

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trative decisions to accord to aliens the protection required under article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention." H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979). *See* Br. Pet. 37-38. The Government also emphasizes the 1979 Senate Report on what became the new asylum provision: "The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the [Protocol and Convention]." S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979). *See* Br. Pet. 38-39. According to the Government, these comments demonstrate that Congress "evinced no intent to alter" section 243(h), Br. Pet. 36. Such a conclusion is unwarranted. For example, the statement that the section had been held to accord the protection required under article 33 but was being amended for purposes of clarity can reasonably be read as no more than a savings provision. The Committee may have intended to ensure that Congress' decision in 1980 to change section 243(h) would not be cited as evidence that aliens whose claims were decided under the old version of the statute had necessarily been denied the benefits of the Refugee Convention. To read the comment as the Government does is to overlook the subsequent legislative history, the statutory language Congress employed, and the international principle it adopted.

[58] *See* S. 529, 98th Cong., 1st Sess., 129 Cong. Rec. S. 6970-86 (May 18, 1983); S. Rep. No. 62, 98th Cong., 1st Sess. (1938) (Senate Judiciary Committee Report on S. 529).

[59] S. 529, § 124(a), 129 Cong. Rec. at S 6975. Section 124(b) provides that an application for withholding of deportation under section 243(h) shall be considered in accordance with the procedures for asylum applications.

> Attorney General reports on the condition of human rights in all countries. These country profiles will provide to the immigration judge who adjudicates the asylum application the necessary information on the country where the applicant claims to fear persecution." [60]

This approach is plainly inconsistent with the Government's contention that an alien must prove that he will be singled out for persecution.

Although the companion bill reported out by the House Judiciary Committee does not contain a similar provision,[61] provisions in both the House and Senate bills for the training of those who decide asylum and withholding of deportation claims also suggest that Congress does not share the views advanced by the Government here. Under both bills, immigration judges are to receive special training in international law and relations.[62] The House Report on this provision explained:

> "Such special training should consist of detailed knowledge of the 1980 Refugee Act, country reports on human rights conditions published by the State Department, the United Nations handbook on refugee processing, and any other reputable sources of refugee or asylum information." [63]

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[60] S. Rep. No. 62, *supra* note 58, at 38 (emphasis added).

[61] H.R. 1510, Rep. No. 115, Pt. I, 98th Cong., 1st Sess. (1983).

[62] S. 529, § 124(a), *supra* note 58; H.R. 1510, Rep. No. 115, Pt. I, *supra* note 61, § 124(a).

[63] H.R. Rep. No. 115, Pt. 1, 98th Cong., 1st Sess. 57 (1983). The Government quotes a passage appearing in this report and a 1982 House Report as support for its argument that Congress intended to make no changes in the standard for section 243(h) cases when it incorporated the provisions of the Refugee Convention into the INA in 1980. Br. Pet. 41 n.38. In pertinent part, the passage states:

> "Some question has arisen as to whether the United States, by agreeing to the Protocol, intended to expand or modify the rights of aliens seeking asylum in the United States. The Com-

The new procedures proposed in the Immigration Reform and Control bill are designed to implement and improve administration of what the Senate and the relevant House Committee understand to be the principles underlying asylum, withholding of deportation, and *non-refoulement* in the 1980 Act and in the Convention and Protocol. The procedures and their legislative history cannot be squared with the notion that an individual must prove that he will be singled out for persecution in order to make out an asylum or section 243(h) claim.[64]

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mittee is convinced that nothing in present law, nor in [the proposed legislation], should be construed as providing less protection than the Protocol. That is, the Committee views the Protocol as creating no substantive or procedural rights not already existing either under current law or under the law as modified by the Committee Amendment. The Committee thus agrees with the holding in *Pierre v. United States* [547 F.2d 1281, 1288 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977),] wherein it is stated that 'accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme.'" H.R. Rep. No. 115, Pt. 1, *supra*, at 59; *see* H.R. Rep. No. 890, Pt. 1, 97th Cong., 2d Sess. 51 (1982).

That statement does not support the Government's position. The Committee said little more than that the law *after* the Refugee Act of 1980 was fully consistent with the Refugee Protocol, and that the Immigration Reform and Control bill would not change that consistency. The Committee's closing remark that accession to the Protocol did not "substantially" alter the "statutory immigration scheme" leaves open the issue here, which is whether that statutory scheme permitted before 1980—and requires since 1980—an administrative practice less restrictive than that advocated by the Government.

[64] In a key compromise concerning the Immigration Reform and Control bill, Senators Kennedy and Simpson and others agreed to judicial review provisions for asylum determinations. *See* 129 Cong. Rec. S 6937-52 (May 18, 1983) (statements of Sen. Kennedy and Sen. Simpson). In discussing the compromise, Senator Kennedy said:

"What I would do, Mr. President, is to ask unanimous consent to include at this point in the record . . . three rather dra-

C. In Any Event, There Is No Coherent Body of Practice Requiring the Evidentiary Showing the Government Proposes.

Contrary to the Government's assertions, the case law under section 243(h) neither constitutes a coherent body of practice nor suggests very much about the quality and quantity of evidence required under that statute. The courts in a number of cases have looked at the evidence in the record and found that it was so insufficient as to justify a denial of relief.[45] Conclusory statements by some courts that aliens failed to demonstrate a "clear probability" or other degree of likelihood of persecution fall far short of establishing a coherent body of practice that Congress should be deemed to have frozen into the statute. On their facts, the cases fail utterly to establish the Government's proposed rule that aliens must prove that they will be singled out, that subjective fear is unimportant, and that near-certainty of persecution must be proved.

One reason courts have resorted to conclusory phrases is that the evidence in many section 243(h) cases has

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matic cases where an immigration judge ruled against a particular individual and because under the current law there are appeal procedures, they went up to the circuit court and the circuit court found for the individuals. I think any fair examination of those three cases would indicate that if those people had been deported they would not be alive today. So judicial [review] probably save[d] these three people from persecution."

129 Cong. Rec. at S 6940. Among the cases cited by Senator Kennedy as demonstrating proper results under existing law were this case and *Reyes v. INS*, 693 F.d 597 (6th Cir. 1982), where the court followed the decision of the Second Circuit in this case.

[45] *See, e.g., Dereoglu v. District Director*, No. 78 C 1106 (N.D. Ill. 1979) (slip op.); *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977); *Pereira-Diaz v. INS*, 551 F.2d 1149 (9th Cir. 1977); *Pierre v. United States*, *supra* note 63, 547 F.2d at 1289; *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Khalil v. District Director*, 457 F.2d 1276 (9th Cir. 1972); *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971).

been so inadequate as not to warrant thorough analysis. Such cases presented no occasion for courts to decide what types and quantity of evidence are required by section 243(h). In *Hamad v. INS*,[66] for example, the District of Columbia Circuit held that the petitioner had failed to meet the "burden of establishing the probability that he would be persecuted in Jordan" [67] where his proof consisted of testimony of his hostile encounter with a Jordanian military officer in a Virginia restaurant. In *Khalil v. District Director*,[68] the Ninth Circuit affirmed the denial of withholding of deportation on a record that contained evidence of little more than the petitioner's subjective fear of deportation. Neither these cases, nor others much like them, establish the evidentiary demands advocated by the Government. To the contrary, they are consistent on their facts with the standard set forth in this brief.[69]

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[66] 420 F.2d 645 (D.C. Cir. 1969).

[67] *Id.* at 647.

[68] 457 F.2d 1276 (9th Cir. 1972).

[69] *See also Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977) (court affirmed denial of claim where alien produced no evidence other than copies of leaflets and pamphlets voicing opposition to the Iranian government, none of which mentioned his name or demonstrated his ownership; in view of his lack of evidence, alien urged the court to adopt a test based solely on his assertions of subjective fear).

In re Dunar, 14 I. & N. Dec. 310 (BIA 1973), discussed by the Government at Br. Pet. 28-29, 34, 47, was a careful effort to reconcile the pre-1980 version of section 243(h) with the Convention and Protocol. The decision is not apposite here. In *Dunar* the BIA read section 243(h) to include types of persecution that are specified in the Convention but that were not then set forth in the statute. The BIA also held that article 33's "threat to life or freedom" test was implemented by section 243(h)'s reference to "persecution." The Board reconciled the mandatory treaty rule of *nonrefoulement* with the then discretionary regime of section 243(h), noting that the

The government agencies charged with implementing the statute even today have no consistent view of section 243(h). Government officials acknowledge that the Department of State and INS do not share a unified view.[70] A recent statement by a State Department spokesman, for example, contrasts sharply with the position of the Government here that the 1980 Refugee Act wrought no change in the pre-1980 law.[71] Testifying before Congress, the Assistant Secretary of State for Human Rights and Humanitarian Affairs stated, "[T]he Refugee Act of 1980 *radically revised* U.S. refugee and asylum law and procedures . . . ."[72] He said that "knowledge of con-

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Attorney General had indicated that he would not exercise his discretion to deport an alien to a place of persecution.

The Board's ultimate conclusion, that accession to the Refugee Protocol did not override the Board's "clear probability" standard, is not inconsistent with the positions urged here. In holding that that verbal formula survived, the Board did not intimate that the formula entailed the restrictive position the Government advocates here with respect to the type and amount of evidence required. Moreover, subsequent to *Dunar* Congress enacted the Refugee Act of 1980, thus overruling any prior administrative practice inconsistent with the treaty.

The few decisions that contain language suggesting a need to prove singling out of the individual alien for persecution are, we submit, erroneous in that respect. *See Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir. 1978) (to establish withholding claim alien "would have to provide some evidence that the Haitian government remembers him"); *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976) (immigration judge found that " '[n]othing presented establishes that the Philippine government has been or now is aware of respondents or has any interest, any adverse interest, in them' ").

[70] *See, e.g., Hearings on Refugee Act Reauthorization, supra* note 11 (statement of Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, Department of Justice, at 5).

[71] Br. Pet. 36-37.

[72] *Hearings on Refugee Act Reauthorization, supra* note 11 (statement by Elliot Abrams, Assistant Secretary for Human Rights and Humanitarian Affairs, at 3) (emphasis added).

ditions in the applicant's country of origin is an important element in assessing the applicant's credibility and whether his fear may be considered 'well-founded.'" [73] Similarly, the Assistant Attorney General recently told a House Committee that "the determination whether an individual's fear of persecution is well-founded rests on whether the individual can convincingly show both that he is subjectively fearful and that his fear is objectively rational." [74] These views of "well-founded fear"—as a broad concept that turns on subjective fear as well as objective conditions in the country of origin—are distinctly different from the position taken in the Government's brief.[75] The uncertainty, both judicial and administrative, about the interpretation of section 243(h) belies the Government's assertion that there is a consistent and cohesive theory of "well-founded fear" that Congress adopted or to which this Court should give deference. [76]

The Government's argument based on the case law is infirm for another reason. The cases decided under pre-

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[73] *Id.* at 4.

[74] *Id.* (statement of Theodore B. Olson at 4).

[75] The INS itself has openly acknowledged its uncertainty in this area. In a study on asylum adjudication completed in December 1982, the INS posed the question: "'[I]s the current law with regard to asylum adjudications workable?'" In its own words, INS answered:

> "We do not know the answer because INS was never able to implement fully the asylum provisions of the 1980 Refugee Act. For this most difficult, time-consuming, and politically controversial work, we neither trained our officers, developed comprehensive final regulations and operating instructions, [n]or gave priority to the effort."

Immigration and Naturalization Service, *Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service, reprinted in* 129 Cong. Rec. S 6939 (May 18, 1983).

[76] Br. Pet. 41-42; *see id.* at 25, 28-32.

1980 law construed a discretionary statute very different from the mandatory rule passed by Congress in 1980.[77] The first case in which a court approved the Government's use of a "clear probability" formula apparently was *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967). That decision and its progeny[78] do not necessarily stand for anything more than that, when the Attorney General had discretion to grant or deny withholding of deportation, he was entitled to require the petitioner to demonstrate a clear probability of persecution. *Lena* itself focused on the Attorney General's discretion:

> "It is clear that the Attorney General employs stringent tests and restricts favorable exercise of his discretion to cases of clear probability of persecution of the particular individual petitioner. The Attorney General's course of conduct, however, shows consistency in the various cases. We cannot say that he has exercised his discretion in an arbitrary manner." [79]

Other courts have been less careful.[80] Their inconsistency further undermines the Government's contention that a

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[77] The Government dismisses as a "peculiar suggestion" the Second Circuit's holding that standards developed under a discretionary statute may be inapposite in implementing a mandatory statute. Br.. Pet. 47. To the contrary, the court recognized a distinction that has been lost on some other courts: that the clear probability formula was not based on the substantive *nonrefoulement* principle, but on the discretion afforded the Attorney General under the pre-1980 version of section 243(h).

[78] *Hyppolite v. INS*, 382 F.2d 98, 100 (7th Cir. 1967); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Kashani v. INS*, *supra* note 69; *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3d Cir. 1976).

[79] 379 F.2d at 538.

[80] *Compare Hyppolite v. INS*, *supra* note 78 (court properly stated the question as whether the Attorney General's refusal to exercise his discretion to withhold deportation was arbitrary) *with*